No. 82-1271
IN THE

Supreme Court of the United States

October Term, 1983

IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Petitioners,

vs.

HERMAN DELGADO, *et al.*,
Respondents.

BRIEF FOR THE RESPONDENTS.

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Questions Presented.

1. Whether INS agents violate the Fourth Amendment when, without cause to suspect any particular individual employed in a workplace of being an illegal alien, they enter the workplace in numbers and without warning and conduct a "survey" by stationing armed agents wearing badges at the workplace exits, handcuffing and arresting those workers who attempt to leave in plain sight of the rest of the workplace, and methodically detaining and questioning the workforce for one to two hours.
2. Whether INS agents violate the Fifth Amendment by discriminating against Hispanic workers in carrying out workplace surveys.

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BRIEF FOR THE RESPONDENTS.

Constitutional Provision and Statute Involved.

Petitioners' Brief contains a correct recitation of the Fourth Amendment and the statute involved.

Statement.

This case concerns the constitutionality of an immigration enforcement program embarked upon by the INS and designed to apprehend large numbers of undocumented workers in the interior of the United States. In contrast to other INS immigration enforcement techniques which have come before this Court and which are designed to apprehend and deport foreign nationals who have unlawfully crossed our borders, the program of "factory surveys" that is at issue in this case has nothing to do with border enforcement. On the contrary, the stated purpose of the national program of workplace surveys is to apprehend those undocumented workers who have assimilated themselves into the general population of the United States. Thus, for the most part,

the surveys are carried out in the industrial areas of our large urban centers.[1]

1. The surveys themselves are unprecedented in the annals of American jurisprudence because of their systematic and widespread violation of civil rights. Although the INS arrested 78 undocumented workers from among 300 employees in the first Davis Pleating survey in January 1977 and 39 out of 200 employees in the second survey (J.A. 51), approximately 75% of the employees in the first survey and 80% in the second survey were citizens of the United States or legal resident aliens. Hence, if the INS arrested 20,000 undocumented workers in factory surveys in a single year in Los Angeles alone as Petitioners claim, it may be inferred that in excess of 100,000 entirely innocent people were detained as the price of apprehending those 20,000 undocumented workers.

In order to carry out the objective of "surveying" workers in their workplaces, the INS utilizes a method of operations which is designed to permit methodical interrogation of the entire workforce. In this way the workplace is effectively transformed into a police interrogation chamber. As the INS concedes, the factory surveys at Davis Pleating and Mr. Pleat were carried out as part of a nationwide program. The characteristics of the surveys are as follows.

When the INS receives a complaint that illegal aliens are employed at a particular company, whether that complaint comes in the form of an anonymous tip over the telephone or in some other form, the company in question is contacted by an INS investigator who requests permission of the employer to conduct an INS workplace survey at some future unspecified date. J.A.

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[1]To carry out "area control," the INS also conducts surveys in urban residential areas and in agricultural areas of this country. *Illinois Migrant Council v. Pilliod*, 398 F.Supp. 882 (N.D. Ill. 1975), *aff'd.* 540 F.2d 1062 (7th Cir. 1976), *modified as to remedy*, 548 F.2d 75 (7th Cir. 1977) (*en banc*); *Marquez v. Kiley*, 436 F.Supp. 100, 436 F.Supp. 100 (S.D. N.Y. 1977); *LaDuke v. Nelson*, 560 F.Supp. 158 (E.D. Wash. 1982).

47; Gilbert Clarin Dep. pp. 67-68; Howard Dodds Dep. pp. 36-37. Ninety percent of the companies that are contacted in this manner permit the INS to carry out a survey at their premises.[2]

The selection of which workplaces to survey on any given day is made randomly by the INS. Fred Englert Dep. p. 53. Further, the determination of survey dates and times is not made in advance but rather workplaces to be surveyed are selected on the day of the survey. Walters Dep. p. 16; Rice Dep. p. 9. Thus it is impossible for employers to forewarn employees of the date of an impending survey.

Since ninety percent of the surveys take place after employer acquiescence to an INS request for permission, those surveys occur without any review by a neutral magistrate of cause for the survey and the mass detentions that occur in the course of the survey. Even in the small minority of cases where warrants are obtained, those warrants are general search warrants that the INS has conceded only authorize entry into the workplace but not the detention of the workers inside. *International Ladies' Garment Workers Union v. Sureck*, 681 F.2d 624, 629, n. 8.[3]

A large force of INS agents, ususally 20 to 30 investigators, work together as a team to carry out the survey. J.A. 47, 149; Claren Dep. p. 81. The workplace is surrounded by INS officers,

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[2]The consent that is obtained from employers for workplace surveys is uninformed since they are asked only to agree to permit "a team of investigators come down and interview your employees," without any explanation by the INS of standard survey procedure such as the sealing of entrances and exits. Kee Dep. p. 29.

[3]When warrants are obtained, they are totally lacking in specificity. Thus, the Davis Pleating warrants described the objects of the warrants as "concealed . . . property; namely persons, namely illegal aliens . . ." and contained neither names nor descriptions of individuals (C.R. 10, Ex. A). As Petitioners explain in their opening brief, specific warrants are unknown to the INS survey teams since the INS agents know neither the names nor have descriptions of any suspected illegal aliens before carrying out surveys. The purpose of the surveys is to uncover such individual suspects.

some of whom are stationed outside, while others stand guard inside all the exits and entrances "in order to guarantee that individuals will not escape."[4] J.A. 48. Marked INS vans are stationed outside the exits and entrances. Dodds Dep. pp. 63, 68. Although the INS agents do not wear uniforms, they carry very visible indicia of police authority on their persons. They all wear badges, they are armed, they carry and display handcuffs (J.A. 134; Smith Dep. p. 109), they carry regulation flashlights (Rice Dep. p. 8), which they are trained to use as batons, and most of them carry unconcealed walkie-talkies. (J.A. 83, 92); Smith Dep. pp. 109, 111; Clarin Dep. p. 109; Rice Dep. p. 8.

The workers who are subjected to a survey reasonably infer that they are not free to leave from their encirclement by INS agents.[5] As the INS agents enter the factory, there are typically cries of "la migra" (the immigration) and individual workers attempt to flee or hide. J.A. 53. Any doubt that may exist in the minds of the workers about whether or not they are free to leave is eliminated when those who attempt to flee through doorways or to hide are physically prevented from doing so or are appre-

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[4]As the United States Civil Rights Commission found in its study of workplace surveys:

> "typically, entrances and exits to the place to be searched are blocked, . . . INS factory raids, then, are carefully planned to ensure that all employees are forced to remain on the premises or are restrained from leaving." *The Tarnished Golden Door, Civil Rights Issues in Immigration*, p. 82 (1980).

Moreover, INS investigators testified that the exits and entrances were blocked to keep anyone from leaving during the surveys. Supervisory Investigator Walters Dep. p. 33; Investigator Rice Dep. p. 11; J.A. 158.

[5]As plaintiff Maria Miramontes testified:

> "that's the first thing anybody thinks standing by the door. It's normal for anybody to think to keep people from leaving." J.A. p. 126.

Similarly, plaintiff Labonte inferred that the INS investigators stationed in the doorways "were blocking everybody inside." J.A. p. 146.

hended and handcuffed before the eyes of their fellow workers.[6] Walters. Dep. p. 49; Kee Dep. pp. 77-79.

Once inside the factory, most of the INS officers form a line across one side of the building. As Investigator Kee described, the September 1977 Davis Pleating survey, when all 16 officers were in the line, they proceeded systematically down the rows of workers seated at their work stations, questioning them as they went. Kee Dep. pp. 64-65. Simultaneously, other officers pursued the workers who attempted to flee or hide. Kee Dep. pp. 77-79.[7]

The INS sometimes obtains the assistance of local police departments in carrying out workplace surveys, as in the September 1977 Davis Pleating survey, where uninformed police officers assisted the INS agents in the factory. J.A. 92, 109.

INS surveys are characterized by a substantial show of force. Thus, non-Hispanic Davis Pleating employee Georgia Wren observed men who were handcuffed and who were treated roughly, "particularly in the way in which handcuffs were put on them . . ." J.A. 78. Similarly, plaintiff Delgado saw employees being handcuffed (J.A. 88, 97) and plaintiff Labonte saw men who were handcuffed in pairs (J.A. 140) being roughly treated by INS officers. J.A. 142.

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[6]App. A, 19a. For example, at Davis Pleating, Delgado saw five people trying to leave through a back exit who were stopped by an INS officer. J.A. p. 82. At Mr. Pleat, Miramontes observed a man attempting to depart after being told to "stay inside" by an INS officer, push the INS agent aside and run out the door. J.A. p. 126.

[7]Assistant District Director Smith reports that:

> "a great amount of time and a large number of officers were required to locate persons who either ran from Immigration officers or who concealed themselves"

in the 1977 Davis Pleating surveys. J.A. p. 49.

The results of the surveys in the workplace is utter chaos and pandemonium among the workers.[8] Although workers characteristically remain at their work stations, after it becomes apparent to them that they have become a "captive workforce," (*ILGWU v. Sureck*, 681 F.2d at 632), most workers are too traumatized to work and work comes to a halt during the entirety of the survey.[9]

Before the questioning begins, there is no general announcement to the workforce by the INS survey team. Walters Dep. p. 35. As the workers are questioned individually, however, the INS agents identify themselves as Immigration officers and then immediately proceed to ask questions about alienage. *E.g.*, Kee Dep. p. 65. It is INS policy to question virtually all persons employed by a company when any survey is carried out. J.A. 49. In most instances, the object of the questioning is to determine

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[8]As the United States Civil Rights Commission determined:

> "Testimony received by the Commission indicates that INS area control operations do cause confusion and pandemonium among all factory employees, thereby disrupting the factory's operations and decreasing production." *The Tarnished Golden Door, Civil Rights Issues in Immigration*, pp. 90-91 (1980).

[9]Plaintiff Delgado, a Davis Pleating supervisor, observed that "the whole factory was put to a stop; standing still." J.A. p. 89. Ramona Correa, also a Davis Pleating supervisor, confirmed that the employees couldn't work. When asked how long she spent calming down employees, she testified:

> "Maybe a half-hour, forty-five minutes because it was a matter of talking to them. 'Come on, relax. It's o.k. They're going away. They're not here anymore. Just forget it.' *So I had to calm them down, because some were crying. They didn't take them. They didn't do anything but ask them questions, but they were still crying.*" J.A. p. 107.

Plaintiff Miramontes, employed at Mr. Pleat, testified that the employees in the factory who were not arrested were nervous for days after the survey. J.A. p. 130.

the immigration status of the workers who are questioned.[10]

INS survey teams often interrogate, but not always, all employees in the workplace about their immigration status.[11] Although Petitioners assert in their brief that investigators question only persons suspected to be aliens, the evidence and admissions of the INS showed clearly that persons are questioned about their citizenship, even if they are not suspected of being aliens. J.A. 55, 152, 154-156.

When INS survey teams selectively question workers, persons are selected for questioning largely as a result of Hispanic ethnic appearance. Agents select persons for questioning based upon clothing, personal grooming; but principally upon whether the worker appears to be of Latin origin.[12] The clothing and other

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[10]As Assistant INS District Director Phillip Smith declared:

> "Immigration officers during the survey usually speak to virtually all persons employed by a company to either ascertain a person's immigration status or to seek information from that person. . . .
>
> When surveys are conducted reasonable questions as to a person's identity and nationality are asked. . . ." J.A. p. 49.

[11]Thus investigators Richard Rice and Carlos Tellez, Jr., testified that INS agents were instructed to, and did in fact, ask all employees questions about their citizenship during surveys. J.A. pp. 152, 154-156. Other investigators testified that they did not question everyone. *E.g.*, Clarin Dep. p. 104; Kee Dep. p. 66.

As the United States Civil Rights Commission found:

> "INS officers in some jurisdictions interrogate all persons in the area targeted for control; others select some persons for interrogation based on ethnicity alone; and still others make selections based on a combination of factors." *The Tarnished Golden Door: Civil Rights Issues in Immigration*, U.S. Commission on Civil Rights, p. 84 (1980).

[12]As emphasized by Assistant INS Regional Director Smith, the primary focus in deciding whom to question is upon "Latin American appearance," consisting of dark hair, brown eyes and dark skin. Smith Dep. pp. 168-169. In selecting persons for questioning, investigators also rely upon varying and subjective concepts of "foreign" appearance

(footnote continued on following page)

appearance factors ostensibly relied upon for questioning on their face, however, are stereotyped and unrealistic, or excessively vague. Moreover, investigators rely upon their own subjective notions of what might be considered foreign manner of dress or appearance since they are given no guidance or instruction about what to look for.[13]

Although INS agents have varying ideas about what constitutes "foreign manner of dress or grooming," they uniformly adhere to INS policy to select workers for questioning in workplace surveys upon the basis of "ethnic, physical appearance."[14] J.A. 37. Since the other factors INS agents rely upon in determining whom to question are so vague and so slanted toward those of Hispanic origin,[15] the only real factor that emerges is whether the "suspect" appears to be Latin.

In the surveys that took place at Davis Pleating in 1977, only Hispanic workers were questioned while Caucasians, Blacks and

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including clothing such as sombreros (Clarin Dep. pp. 75-78; Smith Dep. p. 170), pointed or scuffed shoes (Clarin Dep. pp. 75-78; Dodds Dep. p. 81), flowery blouses (Clarin Dep. pp 75-78) and huaraches [Mexican sandals] (Smith Dep. p. 171; Walters Dep. p 42). Some investigators look for loose clothing (Walters Dep. p. 34) or clothing combinations that clash (Brechtel Dep. pp. 29-30), while others select on the basis of narrow pants (Clarin Dep. pp. 75-78) or new shoes (Walters Dep. p. 42). In personal grooming, some agents look for greasy hair or hair that has not been blown dry or fashionably styled. Dodds Dep. p. 81; Brechtel Dep. pp. 29-30.

[13]Dodd Dep. p. 82; Walters Dep. p. 43; Smith Dep. p. 131.

[14]*E.g.*, Smith Dep. pp 168-169; Patrick Walters Dep. p. 43; John Brechtel Dep. pp. 17, 29; Carlos Tellez Dep. pp. 7-8, 20.

[15]INS written policy provides that suspicion of alienage or illegal alienage must be based on ethnic physical appearance, foreign manner of dress or grooming, apparent inability to speak English, the person's "excessive nervousness or studied nonchalance," a specific tip from a reliable informant or the officer's knowledge of a high concentration of aliens in the area. J.A. 37-38.

The final two factors may be relied upon by the INS as reasons to conduct a survey but are not relied upon to select persons for questioning. Nervousness or nonchalance alone would hardly exclude anyone from questioning; hence, to the extent that distinctions are made among workers for questioning, they are based upon ethnic appearance.

Orientals were skipped over. J.A. 86, 96-97, 147. At Mr. Pleat, virtually everyone was questioned but the Black workers. J.A. 42. The surveys at Davis Pleating and Mr. Pleat took approximately one and one-half hours in duration, falling within the typical one-to-two-hour range for such surveys. J.A. 48, 50, 53-54, 127.

2. The underlying lawsuits in this case were consolidated actions for declaratory and injunctive relief challenging the constitutionality of the INS workplace surveys under the Fourth and Fifth Amendments. Those actions were brought by the individual Respondents and by the International Ladies' Garment Workers Union (ILGWU) on behalf of a class consisting of all persons of Latin ancestry employed in the garment industry, or any other industry, in the Central District of California.

The District Court denied Respondents' motion to certify the class and dismissed the ILGWU as a party for lack of standing. On appeal, the Ninth Circuit never reached the question of the dismissal of the ILGWU on the basis that its holdings "will nevertheless inure to the benefit of the ILGWU." The Court of Appeals held, further, that the District Court did not abuse its discretion in denying class certification, relying upon *James v. Ball*, 613 F.2d 180, 186 (9th Cir. 1979), and the cases cited therein. 681 F.2d at 645, n. 24.

3. Respondent Herman Delgado, a United States citizen, was born in Puerto Rico in 1942 and has lived continuously in the continental United States since 1953. He completed the tenth grade in high school in New York City and received his high school equivalency diploma when he served in the United States Navy from 1960-1966. He has been living in Southern California since 1966. J.A. 79-80

During the second Davis Pleating survey, Delgado, a supervisory employee, was sitting at his desk speaking to another supervisor in English when both men were approached by two INS agents. One of them asked Delgado two questions about his birthplace and after Delgado responded that he was born in Mayaguez, Puerto Rico, the agent, within deliberate earshot of Del-

gado and the other employee, stated to his partner that it would be necessary to come back to Davis Pleating and check these employees out more thoroughly because their English was too good. J.A. 93-94.[16]

Respondent Ramona Correa, a United States citizen, is the same age as Herman Delgado and was born in a suburb of Los Angeles. She has been employed at Davis Pleating for over twenty years and was working as a supervisory employee during the INS surveys. J.A. 100. Correa avoided being questioned in the first survey, perhaps because she interpreted for INS agents. Correa Dep. 46. She was questioned about her place of birth, however, in the second survey.[17] J.A. 115.

Both Correa and Delgado walked to various locations in the factory during the surveys to calm down the workers. J.A. 86, 197.

Respondent Marie Miramontes was a supervisory employee at Mr. Pleat during the INS survey of October 1977. She has worked for Mr. Pleat for more than twenty years. J.A. 117. Although a permanent resident alien, Mrs. Miramontes came to the United States as a child in 1944 and attended and graduated from Roosevelt High School in Los Angeles. J.A. 128. During the Mr.

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[16]During the second Davis Pleating survey, Delgado asked the owner to ask the INS agents to move a van that was blocking the loading dock. Although Delgado testified that he looked through the loading dock door and saw INS buses loading workers who were apprehended, it is not clear whether he personally stepped outside to load the truck. He testified, "I started loading the truck, giving orders to load the truck, because they moved the van and my truck came in. We started loading the truck." J.A. 98.

[17]Petitioners assert that Correa testified that, as a U.S. citizen, she had nothing to fear from the surveys. In fact, she testified precisely to the contrary. Although U.S. citizens and permanent resident aliens objectively have no reason to fear problems in connection with their immigration status, said Correa, the surveys create an atmosphere of fear and intimidation that is frightening and upsetting to U.S. citizens and legal resident aliens. Correa Dep. 76.

Pleat Survey, Mrs. Miramontes was questioned by INS agents about her citizenship. When she responded that she was a permanent resident, she was asked to produce her papers.[18] J.A. 120-121. Mrs. Miramontes testified that she felt compelled to cooperate with the questioning of the INS agents because of the badges that they were wearing. J.A. 121. Although she wanted to leave the factory during the survey, she believed that she was required to remain on the premises because of the INS show of force that she observed going on around her. J.A. 126-127.[19]

Respondent Francisca Labonte, a permanent legal resident, has been residing in the United States since 1962 and has been employed by Davis Pleating since 1964. Labonte Dep. 5-6. Labonte was on layoff during the January 1977 survey but had returned to work in September 1977, and was questioned by INS agents during that survey. Labonte Dep. 15. As Mrs. Labonte was sitting at her machine, she was tapped on her shoulder by an INS agent who stood by her chair and asked her for her papers. J.A. 139.[20]

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[18]Mrs. Miramontes underwent some trying moments as she looked for her immigration documents. Fortunately, she found them but had forgotten them, as she sometimes did when she changed purses, she would have been subject to arrest. J.A. 120-121.

[19]During the Mr. Pleat survey, Mrs. Miramontes overheard INS agents questioning an employee from the shipping department who identified himself as an American citizen. She observed INS agents handcuff the man, though he was subsequently released. Miramontes Dep. 27.

[20]Mrs. Labonte exited the factory, evidently after questioning of the workforce had already been completed. At that point, those persons who had been arrested had already been taken outside of the factory. She stepped out to observe the manner in which the workers who had been pushed and handcuffed were being treated. J.A. 137-138; 143-144. Mrs. Labonte walked only as far as the INS van that was parked outside the door and the INS agents who were in the process of loading the van with suspected undocumented workers. J.A. 136-137. Had Mrs. Labonte tried to leave, it is evident that she would have been stopped by INS agents. Thus an INS agent related an incident that occurred in another survey when a worker left the factory to get something out of his car. The agent followed the person and stood by and watched him to make sure that he would walk back to the factory. J.A. 158.

Summary of Argument.

1. INS workplace surveys effectively seize all workers in the workplace even before any questioning is carried out. At the outset, exits are sealed and guards are stationed. Then, a large number of armed INS agents, wearing badges and equipped with handcuffs, walkie-talkies and police flashlights enter and carry out a synchronized sweep of the workplace, questioning the workers seated at their stations. The INS entry is generally marked by shouts from workers of "la migra" (the immigration) and the apprehension of workers who attempt to escape. By carrying out the surveys in the workplace, the INS creates the impression that workers who attempt to leave will be acting contrary to the wishes of their employer and thus jeopardizing their jobs. Thus, it is evident to all workers, even before questioning has begun, that any attempted departure would be futile. The surveys are typically an hour to two hours in duration, marked by a complete cessation of work amid an atmosphere of fear and confusion.

2. a. INS workplace surveys closely resemble the general searches and seizures carried out by the British which led to the enactment of the Fourth Amendment. They are carried out on the basis of a generalized suspicion that some illegal aliens might be in the workplace, but without any objective reason to suspect even a single individual. They are, therefore, unreasonable seizures, *per se*.

b. INS surveys are unreasonable seizures because the INS is unable to meet its burden of proving that it is necessary to detain all persons in the workplace for an hour to two hours, in order to ask most individuals one or two questions. Further, the surveys are far more intrusive than the brief public stop that is permitted under the exception to the requirement of probable cause for the investigation of a crime. That exception requires a reasonable and articulable suspicion that the person under investigation has committed or is about to commit a crime. Yet, the entire workforce is detained in a survey without reason to suspect any person of illegal alienage.

Petitioners contend that the need to enforce our immigration laws justifies detaining people without reason to suspect them of being illegal aliens. Previous decisions of this Court, however, have already rejected this notion. Moreover, INS surveys cannot be compared to stops at a permanent checkpoint because they are far more intrusive, far longer in duration and roving.

c. Workplace surveys, at best, represent an inefficient utilization of INS resources which could better be deployed at our borders. Because our laws permit the employment of illegal aliens, Mexican nationals and other aliens are drawn to this country by the jobs and other amenities our society makes available to them and by poor economic conditions in their countries of origin. Many of them have become permanent members of our community. Although Congress has failed to take the steps necessary to resolve our national immigration problem, the surveys do not contribute to the solution. Most illegal aliens apprehended in surveys merely return to their jobs within a short time. Those aliens contribute as much to our society as they obtain in social and other services and, for the most part, take jobs that Americans do not want.

In contrast to the minimal value of the surveys to our national interest, is the enormous damage that they do to the privacy rights of thousands of innocent and law abiding citizens and legal aliens.

3. a. This Court has held that persons may be stopped by INS agents for investigation of their immigration status only on the basis of a reasonable and articulable suspicion of illegal alienage. *United States v. Cortez*, 449 U.S. 411 (1981). Moreover, INS surveys are considerably more intrusive than roving patrol stops and serve a far lesser national interest. Thus, no lesser standard of detention for the surveys can be tolerated.

b. The alienage standard urged by the Petitioners would harm citizens who would be mistaken for aliens and would result in discrimination against Hispanic-Americans. Apart from dark skin and dark features, there is no objective criterion that INS agents can rely upon to attempt to differentiate aliens from citizens. Moreover, an alienage standard would effectively deprive the

five million aliens legally residing in the United States of all Fourth Amendment protection.

c. 8 U.S.C. 1357(a)(1), upon which Petitioners rely, cannot be construed to permit detentions on the basis of mere alienage since it must be construed in a manner consistent with the Fourth Amendment. The purposes of the alien registration requirements of our immigration laws are fully served by the statutory requirement that aliens register every change of address and a recent Congressional amendment to 8 U.S.C. § 1305, reflects an intention to regulate legal aliens less rather than more. Therefore, no legitimate government interest would be served by permitting aliens to be stopped at will by INS agents.

4. Petitioners make the circular argument that they should be excused from the particularity requirement of the Fourth Amendment because they have no particularized information upon which to base a suspicion of any individuals in the workplace before conducting a survey. The history of the Fourth Amendment teaches that it was precisely in order to guard against indiscriminate and arbitrary seizures of individuals that the particularity requirement was expressly inserted in the Fourth Amendment. Further, this Court in *United States v. Cortez, supra*, held that suspected illegal aliens may not be detained in the absence of a particularized basis of suspicion.

The line of cases involving administrative inspections is inapposite because businesses are known to be within the scope of regulation and the inspections are impersonal in nature. In contrast, workers detained in surveys are not known to be aliens, nor illegal aliens, and the intrusion is much greater and of a personal nature. Although administrative inspectors have very limited discretion, INS agents in surveys have complete discretion to detain anyone in the workplace without limitation.

5. INS surveys violate equal protection and, thus, the Fifth Amendment, because INS agents discriminate against persons of Hispanic origin in the questioning that takes place during the surveys.

ARGUMENT.

I.

INS WORKPLACE SURVEYS VIOLATE THE FOURTH AMENDMENT BY SEIZING ALL WORKERS IN THE WORKPLACE WITHOUT A PARTICULARIZED AND OBJECTIVE BASIS FOR SUSPECTING ANY OF THEM OF ILLEGAL ALIENAGE.

A. During the Course of INS Factory Surveys, Workers Are "Seized" Within the Meaning of the Fourth Amendment.

In *Florida v. Royer*, 103 S.Ct. 1319 (1983), this Court adopted the test contained in J. Stewart's plurality opinion in *United States v. Mendenhall*, 446 U.S. 544 (1980), to determine when government conduct constitutes a "seizure" under the Fourth Amendment. The issue is whether the show of official authority was such that a "reasonable person would have believed he was not free to leave." 446 U.S. at 554. Although Petitioners dispute that INS surveys result in seizures, the facts are overwhelmingly to the contrary.

Rather than just a brief seizure, INS factory surveys represent a very considerable intrusion upon the privacy of the many workers who are captured in the course of these surveys. As the Court of Appeals found, the surveys and the concomitant detention and coerced questioning of the workforces involved are far more intrusive than the minimal intrusions involved in *United States v. Mendenhall, supra*, and *Reid v. Georgia*, 448 U.S. 438 (1980), *ILGWU*, 681 F.2d at 633. In *Mendenhall*, the subject was approached in a public place by two agents who wore neither uniforms nor badges. She was merely asked to voluntarily show her identification and airline ticket. In contrast, workers subjected to surveys suffer a much greater invasion of privacy and are subjected to a significantly greater showing of official authority.

First, surveys are not staged in a public place where one might expect to be approached by a stranger, but rather in the individual's workplace, generally a factory. *Cf. Florida v. Royer*, 103 S.Ct. 1319, 1327 (1983). Employees who go to their workplaces reasonably anticipate that their privacy may be limited for legit-

imate business reasons by customers, other employees, or by others having a business reason for being present on the premises. When employees come to their workplaces, however, they do not reasonably anticipate that they will be confronted by law enforcement officers who will seal all exits and then approach them for questioning. Even when an employer permits INS agents entry, he cannot deprive his employees of their legitimate expectations of privacy against governmental intrusion. *Cf. Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 394 (1971). The Fourth Amendment guarantee of "the right of the people to be secure in their . . . houses," does not just refer to one's dwelling but extends also to one's place of work. *See v. Seattle*, 387 U.S. 541, 543 (1967). Respondents submit that police conduct which might amount to nothing more than mere questioning in a public place would cause a reasonable person to believe that he was not free to leave if it occurred at his place of work. *United States v. Mendenhall*, 446 U.S. 544, 554; *Florida v. Royer, supra*. In a public place, one can simply walk away from the officer who has approached and asked a question; at one's place of work, however, in addition to the show of authority implicit in the introduction of the officer and the initial questioning, is a feeling that one really cannot walk away from one's job.

Further, the location of INS surveys in the workplace suggests to the average worker that the encirclement of the workforce and the other actions taken by INS agents have been taken with the cooperation and approval of the employer. Thus, the average worker will fairly assume that any attempts to leave will be regarded as insubordination by the employer and result in termination. Hence, the location of the surveys in the workplace increases the coercive effect upon the workforce.

Secondly, the surveys typically entail the surrounding of the workplace by INS agents who are stationed in and around all doorways to prevent escape.[21] In addition to the physical presence

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[21] *Babula v. INS*, 665 F.2d 293 (3rd Cir. 1981); *Illinois Migrant Council v. Pilliod*, 531 F.Supp. 1011, 1018 (N.D. Ill. 1982).

of the agents themselves, are the INS vans which are placed outside the doorways. Workers who are captured in the surveys perceive that they have been encircled and that the exits to the workplace have been sealed. *ILGWU*, 681 F.2d at 630. This reasonably leads them to conclude that departure from the premises is not permissible. *Cf. U.S. v. Nicholas*, 448 F.2d 622 (8th Cir. 1971).

Third, in contrast to the mere approach of persons by one or two officers in a public place, the surveys are characterized by a massive show of police force. All of the agents, including the ones that were stationed in all doorways, wear badges and carry or wear handcuffs. Most of the agents in the Davis Pleating and Mr. Pleat surveys carried walkie-talkies, which the workers were able to see. J.A. 92, 118. Unlike the casual approach in the airport concourse found in *Mendenhall, supra*, and *Reid v. Georgia, supra*, in the Davis Pleating and Mr. Pleat surveys, a large number of agents suddenly entered the premises, blocked all doorways, and took immediate steps to begin systematic interrogation of the workers. Agents stationed themselves in a formation at one end of the factory and then simultaneously began walking down the lines of workers, questioning workers. Kee Dep. 64-65. The badges and other police equipment made their authority clear to the workers. Beyond that, the handcuffs, flashlights and walkie-talkies carried the message that the agents had come, not to engage in casual questioning of some workers, but to exercise force if necessary. The large number of INS agents involved, all of them visibly equipped with instruments of police force, and the complete coverage of the factory with agents walking down all of the aisles in para-military formation, reasonably suggested to the workers that the focus of the show of force and authority was on each and every one of them rather than on just a few suspected individuals. This impression was reinforced to the average person by the fact that the great majority of workers were questioned. Under the restraint of that show of police force and authority, only an extraordinary person would have attempted to depart from the factory during the surveys.

Fourth, the intimidating psychological effects of the initial INS entry into the factory and the sealing of the exits and entrances were intensified by the resultant screams of "la migra" (the immigration) and the desperate efforts of some workers to hide or run from INS agents.[22] Moreover, the workforce perceived at the outset that workers who attempted to flee to the exits were stopped or apprehended and handcuffed. *ILGWU*, 681 F.2d at 630, 633-634. In the survey at Mr. Pleat, a worker who told the questioning INS agent that he was a United States citizen was handcuffed, though later released, suggesting to those around him that one might be handcuffed or arrested for merely being disbelieved about one's citizenship. Miramontes Dep. p. 27.

Fifth, the employees in the surveyed factories were not told by the INS agents at any time during the surveys that they were free to leave. *Florida v. Royer, supra*, 102 S.Ct. at 1327. On the contrary, they could not have left if they had attempted to do so. J.A. 48; Walters Dep. 33.[23] Further, the purpose of the survey was never announced to the workers in the factory. Walters Dep. 35. Unless and until a particular worker had been approached by an INS agent for questioning or overheard the questioning of other workers, he could only make assumptions about the purpose of the police activity going on around him from what he observed. When it became the turn of a particular worker to be questioned, immediately after the officer identified himself as an Immigration Officer, he focused on the immigration status of the worker being questioned. Kee Dep. 65. This reinforced the perception of the average worker that the display of police force that was all around him in the factory was directed at him personally as a suspect

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[22]The beginning of the typical INS survey is characterized by such screams and by persons running to try and escape from the building. J.A. 53. It is curious that the INS disclaims responsibility for this aspect of the surveys since the INS depends upon these inevitable results of INS survey procedure for the disarming effect they have on the majority of the workforce.

[23]Employees who tried to leave at Mr. Pleat and Davis Pleating were stopped at the door by INS agents. J.A. 82, 126.

rather than simply as a witness. Since he was the subject of the questioning, it was evident that he was required to cooperate by answering the questions and by remaining on the premises as long as the INS agents remained present.[24]

Sixth, rather than the momentary investigative detention of *Terry v. Ohio*, 392 U.S. 1 (1968), persons involved in INS surveys are detained for one to two hours.[25] J.A. 48, 53-54, 127.

Petitioners appear to concede that illegal aliens involved in surveys reasonably feel that they are not free to leave but assert that U.S. citizens and legal residents have no reason to have similar feelings. This argument ignores the reality that the guarded doorways, the persons who are physically prevented from leaving, and the comprehensive display of authority make it clear to all workers that departure during the survey is prohibited. Moreover, it would be apparent to the average worker, U.S. citizen or otherwise, that any attempt to leave the premises while the survey is going on would be regarded as an indication of guilt. *Cf. Babula v. INS*, 665 F.2d 293, 298 (3rd Cir. 1981). As Respondent Marie Miramontes testified:[26]

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[24]LeFave, *Search & Seizure*, Ch. 9, Supp. p. 23 (1983).

[25]There is nothing in the record to support Petitioners' contention that workers who were detained in the course of the survey are free to leave after they answer questions. To the contrary, workers are not so informed and reasonably believe that they must remain present because of the continued display of INS force and authority. Agents remain stationed at the exits and entrances through the entirety of the survey, employees who attempt to escape or hide continue to be apprehended as they are encountered and the questioning continues in a systematic fashion until the survey is completed. Even if one were to accept Petitioners' unsupported contention that workers can leave after they are questioned, Petitioners apparently concede that they are not free to leave up to that point in time. Thus, certainly the workers who are questioned in the last half-hour of the survey, even under the Government's analysis, are detained far in excess of an hour.

[26]The Respondents, as would-be class representatives, under FRCP 23(a)(4), could have been expected to have been more courageous and assertive than the average worker. *Shulman v. Ritzenberg*, 47 F.R.D. 202, 207 (D. D.C. 1969); *Carpenter v. Hall*, 311 F.Supp. 1099, 1114 (D.C. Texas 1970); *Mercy v. First Republic Corp. of America*, 43 F.R.D. 465, 470 (S.C. N.Y. 1968).

> "Because if I leave and they think I don't have no papers and they shoot me or something. They see you leaving and they think I'm guilty." J.A. 127.

Contrary to Petitioners' contentions that persons with a lawful immigration status had nothing to fear in the surveys, Respondent Correa observed that U.S. citizens and lawful resident workers at Davis Pleating were immobilized by fear during the surveys, Correa Dep. p. 76, and INS agents made it clear to Respondent Herman Delgado, a United States citizen, that he could be arrested if he were disbelieved about his lawful immigration status. (J.A. 94). Indeed, a worker who identified himself as a U.S. citizen was handcuffed by INS during the Mr. Pleat survey, though later released. Miramontes Dep. 27.

Petitioners assert that the seizure of the workers is theoretical because the workers are free to go about their business, but the record demonstrates clearly that work came to a complete standstill as the workers were too much in shock and too frightened to perform any work. J.A. 89, 107, 130. Even after the INS agents left the factory, company supervisors were trying to calm down workers who were still crying. J.A. 107. Nervousness that was engendered by the surveys made it difficult for employees to go about their normal duties for days afterward. J.A. 130. Despite Petitioners' attempt to prove to the contrary, all workers subjected to INS workplace surveys are seized before any questioning has begun.

B. Persons Subjected to INS Workplace Surveys Are Unreasonably Seized.

1. INS Surveys Are Violative *Per Se* of the Fourth Amendment.

The very nature of INS workplace surveys renders them unreasonable under the Fourth Amendment. INS workplace surveys closely resemble the general searches and seizures carried out by British customs officers in our pre-revolutionary days. The British utilized writs of assistance that authorized the search of residential and commercial buildings and the apprehension of undescribed persons and the indiscriminate seizure of their papers and prop-

erty.[27] The use of these general search warrants was "the first in a chain of events which led directly and irresistibly to revolution and independence."[28] As this Court has written, the "indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 582 (1980). The INS workplace surveys possess the same indiscriminate quality as the writs of assistance that were employed by the British to tyrannize the American Colonists. Although no written warrant is involved in most INS workplace surveys, it would be ironic if the absence of a general warrant could immunize the evil that the second clause of the Fourth Amendment was clearly designed to prevent. The warrant clause of the Fourth Amendment implies that seizures must be regarded as unreasonable if they are of the general variety that the warrant clause of the Fourth Amendment clearly intended to forever invalidate.[29]

INS workplace surveys are the modern version of the pre-revolutionary British customs raids. Apart from generalized notions that there may be illegal aliens in a particular area, the INS seals off an entire factory and detains all the workers for an hour to two hours without reason to suspect even a single individual. Because of the grave danger posed by such affronts to our freedom, our founding fathers determined that general seizures such as the INS surveys are unreasonable *per se* under the Fourth Amendment.

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[27]N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, pp. 51-53 (reprinted in 1970). The writs of assistance were warrants which empowered British customs officials and their deputies to search at will to find persons whom they suspected to have smuggled molasses into the Colonies without the payment of customs' duties, or to find evidence of smuggling.

[28]Lasson, p. 51, citing Albert Bushnell Hart, in *American History Leaflets*, No. 33, Introduction.

[29]Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L.Rev. 349, 411 (1974).

2. Previous Decisions of This Court Demonstrate That INS Surveys Constitute Unreasonable Seizures.

a. The extraordinary length of the detention involved in the surveys establishes convincingly their illegality under the Fourth Amendment. In *United States v. Place*, 103 S.Ct. 2637 (1983), this Court held that the detention of the respondent's luggage for ninety minutes, alone, precluded the conclusion that the seizure was reasonable in the absence of probable cause. The brevity of the invasion "is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion." *United States v. Place, supra* at 2645; *Florida v. Royer, supra*. Any investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Moreover, it is "the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Florida v. Royer, supra* at 1326. INS workplace surveys are really fishing expeditions which punish the majority of the innocent in order to apprehend a few lawbreakers. Thus, even though most people are asked only a question or two in order to "survey" the entire workforce, everyone must remain under detention for one hour to two hours.

It is apparent that the INS cannot show that it is necessary to detain a person for an hour and one-half in a survey in order to ask him one or two questions. Moreover, the INS could, if it chose to respect individual rights, engage in the kind of police investigation that law enforcement agencies traditionally carry out in order to obtain evidence upon which to base an individualized suspicion of illegal alienage and probable cause for arrest. The INS cannot meet its burden of showing that it is necessary to capture hundreds of innocent workers at once without any basis of suspicion in order to fish out a few persons for further investigation. *Florida v. Royer, supra*.

INS factory surveys closely resemble traditional arrests. Although the element of transportation to the police station is absent (*Dunaway v. New York*, 442 U.S. 200 (1979)), the number of

agents involved, the badges they wear, and the handcuffs and other equipment that they carry contribute to the transformation of the workplace into what is effectively an INS interrogation room. These extensive and lengthy surveys are a far cry from the brief investigatory stop by a police officer or two in a public place of *Terry v. Ohio*, *supra* or *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

In *Terry* and its progeny, this Court created a limited exception to the rule requiring that a seizure be based on probable cause to believe that the persons seized committed a crime. That exception authorized officers to minimally intrude upon an individual's Fourth Amendment rights for the purpose of investigating possible criminal behavior on the basis of a reasonable and articulable suspicion that the person in question had committed or was about to commit a crime. *United States v. Place*, *supra* at 2642. The cases that fall within that limited exception are all characterized by a brief stop by one or two police officers in a public place for the purpose of investigation. *Terry v. Ohio*, *supra*; *United States v. Cortez*, 449 U.S. 411 (1981); *United States v. Mendenhall*, 446 U.S. 544 (1980). The seizures at issue in this case are far more intrusive. They are carried out by numerous agents, they are characterized by substantial displays of force, and they do not occur in a public place but rather depend upon the capture of the workers in their enclosed workplaces.

Petitioners assert that the public interest in apprehending aliens who become assimilated into the population of our urban areas justifies the surveys. This Court has held, however, that the substantial public interest in protecting our borders and preventing the entry of illegal aliens does not justify indiscriminate detention for questioning of persons in border areas. *Brignoni-Ponce*, *supra*; *United States v. Cortez*, *supra*. As this Court held in *Cortez*:

> "The detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." 449 U.S. 417-418.

Petitioners' justification for the workplace surveys is that they are an effective means of detecting illegal aliens who have eluded

the border patrol. Petitioners have not suggested, however, that there is any greater public policy interest served by the workplace surveys than by the roving Border Patrol stops involved in *Brignoni-Ponce, supra,* and *U.S. v. Cortez, supra.* Thus the seizures that are involved in this case are controlled by those earlier decided immigration enforcement cases.

b. Although Petitioners contend that they should be permitted to carry out the surveys without any individualized basis of suspicion, (*U.S. v. Martinez-Fuerte,* 428 U.S. 543 (1976)), the case on which they principally rely stands for a much more narrow proposition. In *Martinez-Fuerte,* the Court permitted a limited exception to the general doctrine that an investigatory stop must be justified by objective manifestations that the person stopped is, or is about to be, engaged in criminal activity. A fixed checkpoint operated by the Border Patrol was permitted at or near intersections of important highways leading away from the border for the purpose of interdicting the flow of illegal traffic from Mexico. The checkpoint in *Martinez-Fuerte* satisfied this Court's definition of a functional border equivalent since it was located "at a point marking the confluence of two or more roads that extend from the border." *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973). At the physical borders of the United States and its functional equivalents, Fourth Amendment protection is not as great as in the interior of this country. *Almeida-Sanchez v. United States, supra; United States v. Barbera,* 514 F.2d 294 (2nd Cir. 1975). The Petitioners do not contend that the surveys are conducted at functional equivalents of the border, nor that they assist in border enforcement. To the contrary, they admit that the surveys are part of a nationwide program designed to apprehend illegal aliens who have taken up residence and become employed in industrialized areas in the interior of this country.

Integral to *Martinez-Fuerte* was the pre-established and publicly known location of the checkpoint, which could reasonably be calculated to result in minimal fright or annoyance on the part of the motorists who were stopped. Thus the motoring public knew in advance the location of the checkpoints from the "reg-

ularized manner" in which the checkpoints were operated, and knew precisely what to expect when they arrived at a checkpoint. *Martinez-Fuerte, supra* at 559.

Although this Court in *Martinez-Fuerte* found permanent checkpoints to be appreciably less intrusive than roving patrol stops, INS workplace surveys are more intrusive than either the permanent checkpoint in *Martinez-Fuerte* or the roving patrol stop of *Brignoni-Ponce*. INS workplace surveys are also roving and the workers are given absolutely no warning before the INS agents suddenly appear and seal off the factory. As the Court of Appeals found, the workplace surveys generate considerable fear and anxiety on the part of the workers who are subjected to the survey. *ILGWU*, 681 F.2d at 644. In contrast, the permanent checkpoints result in minimal potential interference with legitimate traffic since perhaps .5% of automobiles that travel through the checkpoint are even required to stop for a brief three-to-five-minute period. All the others are merely required to slow down or stop for a second or two.

Workers interrogated in surveys suffer a greater invasion of privacy because they must divulge personal information about their citizenship and place of birth not only to INS agents but also to their co-workers seated around them. Moreover, their forced detention of one and one-half hours is far more burdensome than the brief intrusion involved in *Almeida-Sanchez*.

Brief stops of vehicles on highways have a long history in this country and are accepted by motorists as incidental to highway use.[30] *Martinez-Fuerte, supra*, at 560-561. Thus *Martinez-Fuerte* falls within a "special category" of Fourth Amendment cases

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[30]In comparison, workplace surveys in urban areas are of very recent vintage. They began to be utilized by the INS only in 1975. *Hearing on Undocumented Aliens, Feb. 24, 1978, before the Subcommittee of the Department of State, Justice & Commerce, the Judiciary, and Related Agencies Appropriations; U.S. House of Representatives*, 95th Congress, 2d Session, testimony of Carlos Vellanoweth, p. 324; John Brechtel Dep. p. 7.

which recognize that a lesser degree of privacy is accorded to the occupants of automobiles than to persons in homes or offices. *Cf. Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315, n. 10 (1978); *Chambers v. Maroney*, 399 U.S. 42, 48 (1970). This Court was also careful to emphasize in *Martinez-Fuerte* that INS agents at the permanent checkpoints have limited discretionary enforcement authority. In contrast, as the Court of Appeals observed, in the factory survey the agents have virtually unfettered discretion to question anyone or everyone in the workplace. Moreover, they have unlimited discretion to select any workplace of their choice for a survey at any given time.

United States v. Villamonte-Marquez, 103 S.Ct. 2573 (1983), is also relied upon by Petitioners, but has no bearing upon INS workplace surveys. The decision turned upon a lengthy statutory history which reflected that the same Congress which promulgated the Fourth Amendment intended an exception for the vessel boardings that were at issue in the case. Further, the case involved the far more limited expectations of privacy that are involved in the brief detention and boarding of a vehicle on a public waterway in order to check documents. *Cf. Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315, n. 10 (1978). A far better comparison is presented by *United States v. Ortiz*, 422 U.S. 81 (1975) which also involved permanent checkpoints but which invalidated automobile searches for illegal aliens in the absence of probable cause. *Ortiz* demonstrates that a substantial intrusion upon privacy such as the INS workplace surveys cannot be justified under the limited exception of *Almeida-Sanchez*.

3. INS Surveys Do Not Further National Immigration Policy Objectives.

Petitioners assert that the workplace surveys are in the national interest because aliens create economic and social problems and compete with citizens and legal resident aliens for jobs. The evidence suggests, however, that the surveys at best represent a superficial approach to a very complex national problem. As the Attorney-General of the United States recently testified, the targets of the INS factory surveys are "largely . . . persons with a

permanent attachment to the nation," who are "unlikely to be displaced from our territory." Thus the Attorney-General observed that many of these people have "become, in effect, members of the community," and asked Congress to grant "limited legal status to the productive and law-abiding members of this shadow population," and to "recognize reality and devote our enforcement resources to deterring future illegal arrivals." *Plyler v. Doe*, 457 U.S. 202, 218, n. 17 (1982).[31] Moreover, as this Court states in *Plyler v. Doe*, *Id.*, at 228.

> "the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the State fisc."[32]

Although Petitioners rely on apprehension statistics for illegal aliens who are apprehended in the course of workplace surveys, it is questionable whether these surveys have any actual long-term salutary effect. The evidence suggests that undocumented aliens hold jobs that U.S. citizens and resident aliens refuse to take.[33]

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[31]Former INS Commissioner Leonard Chapman testified in 1978 that it was "unthinkable" to him "to field an army of investigators to ransack our cities to find the millions of illegal aliens who are living in the midst of 220 million Americans." His proposal to deal with the problem of illegal immigration was (1) better prevention to prevent entry at the border at ports of entry, and (2) legislation to make it illegal to hire illegal aliens. *Hearings on Oversight of the Immigration & Naturalization Service before the Subcommittee on Immigration, Citizenship & International Law of the House Committee on the Judiciary*, 95th Congress, 2d Session, p. 88 (1978).

[32]The Select Commission recently determined that undocumented/illegal aliens do not place a substantial burden on social services and found, further, with respect to job displacement that economists differ about whether or not illegal aliens take jobs of American citizens and resident legal aliens, or just take jobs that American workers don't want. *U.S. Immigration Policy & the National Interest: Committees on Judiciary, House of Representatives and the United States Senate*, 97th Cong., 1st Session, p. 37 (1981).

[33]Cornelius, *Mexican Migration to the United States: Causes, Consequences, and U.S. Responses*, Center for International Studies, Massachusetts Institute of Technology, pp. 55-56, 66-67, 70 (1978).

Thus, the factory surveys create a revolving door effect because illegal aliens transported across the Mexican border after factory surveys return to their jobs after a day or two.[34] Perhaps because Congress in fact perceives that illegal aliens help the economy,[35] it is lawful for employers to hire illegal aliens. Thus under 8 U.S.C. 1324(a), employment of illegal aliens is expressly excluded from the definition of harboring. Moreover, Congress has repeatedly failed to take the necessary steps to solve the problem of illegal immigration.[36] As long as foreign workers are encouraged to enter this country illegally by our policy of treating the employment of undocumented workers as lawful and through the inadequate enforcement of our immigration laws at out borders,[37]

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[34]In 1982, the INS publicized a series of workplace surveys dubbed "Operation Jobs" with the stated objective of opening "higher paying" jobs for unemployed Americans and legal residents by deporting illegal aliens. Of the 5,635 illegal aliens that were suspected to be present in the factories, 801 were arrested and deported. The Los Angeles Times found that 80% of those illegal aliens were back on the job three months after the surveys were conducted. "*Most Aliens Regain Jobs After Raids*," Los Angeles Times, August 1982.

[35]Note, *Developments-Aliens*, 96 Harv. L.Rev. 1286, 1441 (1983).

[36]As Justice Powell observed in *Plyler v. Doe*, "perhaps because of the intractability of the problem, Congress . . . has not provided effective leadership in dealing with this problem." 457 U.S. 202, 237 (1982). The most recent immigration bill which, if passed, would have the effect of legalizing the status of millions of illegal aliens, while imposing criminal sanctions on employers who hire illegal aliens, has apparently died in the House of Representatives. "*Immigration Bill Dead This Year, O'Neill Says*," Los Angeles Times, October 5, 1983.

[37]Thus Congress has provided only a small portion of the funds needed by the border patrol to perform effectively at the borders. Note, *Developments-Aliens*, 96 Harv. L.Rev. 1286, 1439-1440, 1983. As former INS Commissioner Leonel Castillo noted in an interview in 1979, there were only 350 border patrol agents who were on duty patrolling all of the thousands of miles of Mexican/United States and Canadian/United States borders at any one time. Transcript of Firing Line, Interview of Leonel Castillo, telecast on PBS January 21, 1979, Southern Educational Communications Association.

it will be impossible to deal effectively with our immigration problems. INS workplace surveys simply do not provide a solution and are enormously destructive of the Fourth Amendment rights of a large segment of our society.

The surveys themselves have not been seriously proposed as a solution to the problem of illegal immigration.[38] To the contrary, the Select Commission on Immigration and Refugee Policy, in its *Final Report and Recommendations*, recommended a large increase in manpower and resources at the Mexican border, employer sanctions, higher levels of legal immigration and the legalization of illegal aliens now in the United States, while opposing any massive deportation program which would inevitably sacrifice the rights of many legal residents without reaching more than a small portion of the illegal aliens residing in this country.[39] Further, the United States Commission on Civil Rights in 1980 concluded that the "INS should immediately cease its area control operations as currently conducted, to prevent the continued violation of the constitutional and civil rights of individuals."[40]

In *Plyler v. Doe*, *supra*, at 228-229 (1982), this Court rejected the State of Texas' contention that barring the children of illegal aliens from Texas schools would promote the nation's interest in preventing illegal immigration. As this Court stated:

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[38]Current INS Commissioner Alan C. Nelson has stated that only a three-pronged approach of employer sanctions, amnesty for many illegal aliens already here, and stepped-up enforcement at the border could make a lasting difference. The INS is currently seeking a 50% increase in the number of border patrol officers. "*INS Chief Seeks Boost in Patrols*," Los Angeles Times, October 7, 1983.

[39]*U.S. Immigration Policy and the National Interest, the Final Report of the Select Commission on Immigration and Refugee Policy of the Senate Committee on the Judiciary and Subcommittee on Immigration Refugees and International Law of the House Committee on the Judiciary*, 97th Congress, 1st Session, pp. 72-73 (1981).

[40]"*The Tarnished Golden Door: Civil Rights Issues in Immigration*," U.S. Commission on Civil Rights, p. 94 (1980).

> "[W]e think it clear that 'charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration,' at least when compared with the alternative of prohibiting the employment of illegal aliens."

Similarly, INS workplace surveys apprehend relatively few of the millions of undocumented workers who have taken up residence in our cities without having any appreciable effect on the overall immigration problem. Many of the deported workers, drawn by the jobs that are lawfully held open for them by their employers, succeed in repeatedly crossing the Mexican border and resuming their residency in this country.[41] The places of those workers who fail to return are taken by other illegal immigrants from Mexico or Central America, who are drawn by poverty and high unemployment in their own countries and the prospect of jobs in the United States.[42]

Moreover, the INS workplace surveys are carried out at an enormous price to our people and our democratic ideals. In addition to the thousands of members of our community who have been uprooted as a result of the surveys,[43] a far greater number of entirely innocent citizens and legal resident aliens have been subjected to wholesale intrusions on their personal security. Many thousands of other Hispanic-Americans in our central cities who

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[41]In a study of illegal immigration, 69% of the illegal aliens (residing in the United States) who had entered the United States illegally, had previously been apprehended on one or more occasions. Cornelius, *Mexican Migration to the United States: Causes, Consequences, and U.S. Responses*, Center for International Studies, Massachusetts Institute of Technology, p. 24 (1978).

[42]See Cornelius, *id.*, generally at 31-43.

[43]In presenting to Congress several presidential proposals for immigration reform, the Attorney-General stated that:

> "We have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community." *Plyler v. Doe*, 457 U.S. 202, 218, n. 17 (1982).

have learned about the surveys from their friends and neighbors and from the widespread publicity that the surveys have received, live in fear that their workplaces will soon be targeted for an INS survey.[44]

C. The Fourth Amendment Requires That INS Agents Have a Particularized and Objective Suspicion of Illegal Alienage in Order to Detain Any Person for Questioning.

1. INS Agents Must Have a Suspicion of Illegal Alienage in Order to Detain Any Workers for Questioning in Workplace Surveys.

a. As the Court of Appeals correctly held, all of the persons in a workplace are seized before any questioning has begun in the course of INS workplace surveys. Until information is elicited through the questioning process, the INS agents have no reason to suspect any of the detained workers of being illegal aliens, or even aliens, since the agents do not know the identities of the workers in the workplace and have no specific information about any of them.[45] However, the issue of what standard applies to detentive questioning by INS agents remains.

The Court of Appeals concluded correctly that INS agents must have an individualized and articulable basis to suspect any person detained for questioning of illegal alienage.[46] In *United States v.*

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[44]The INS conducts surveys in many industries that employ large numbers of unskilled or semi-skilled workers. J.A. 46-47. Those industries also characteristically employ many Hispanic-Americans and the surveys, in Southern California, take place largely in factories that predominately employ Hispanic-Americans. Tellez Dep. p. 7; Brechtel Dep. p. 16; Walters Dep. p. 25.

[45]Petitioners admit that when the INS is denied entry by an employer, they can only obtain a generalized warrant since they are unable to name or specifically describe the persons they are seeking to apprehend. Brief for the Petitioners at n. 18.

[46]The Select Commission recommended that temporary detention for brief interrogation be permissible only on the basis of reasonable cause to believe that the person detained is an illegal alien. *U.S. Immigration Policy and the National Interest, the Final Report of the Select Commission on Immigration and Refugee Policy of the Senate Committee on the Judiciary and Subcommittee on Immigration Refugees and International Law of the House Committee on Judiciary*, 97th Congress, 1st Session, Section VIII A.1 (1981).

Brignoni-Ponce, 442 U.S. 873, 884, this Court held that border patrol officers on roving patrol may briefly stop vehicles on roads near the border "only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." Although *Brignoni* reserved the question of whether border patrol officers may stop persons reasonably suspected to be aliens, the reasoning of *Brignoni* and of subsequent decisions by this Court suggests that INS agents who carry out workplace surveys may detain persons for questioning only on the basis of a reasonable suspicion of illegal alienage. *United States v. Cortez*, 449 U.S. 411, 419, 695 (1981); *Florida v. Royer*, 103 S.Ct. 1319, 1324 (1983); *Reid v. Georgia*, 448 U.S. 438, 440 (1980).

The decision in *Brignoni-Ponce* conformed to the doctrine that in exigent circumstances, the importance of the governmental interest involved may justify a brief stop based upon facts that do not amount to probable cause for arrest. *Terry v. Ohio*, 392 U.S. 1 (1968). Cases decided since *Brignoni* have held that even if the exigencies of the law enforcement interest involved permit a brief stop under *Terry*, the stop is permissible only on the basis of reasonable suspicion that someone has committed or is about to commit a crime. As this Court stated in *Florida v. Royer*, 103 S.Ct. at 1324:

> "*Terry* created a limited exception . . . . certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime."

See also, *Reid v. Georgia*, 448 U.S. 438, 440; *Michigan v. Summers*, 452 U.S. 692 at 699 (1981). In the case of *United States v. Cortez, supra*, which involved the stop of a vehicle by the Border Patrol, this Court addressed the question reserved in *Brignoni* and determined that border patrol officers must be able to justify any investigatory stop on the basis of a particularized and objective basis to suspect the particular person stopped of illegal entry.

The "exigent circumstances" involved in the operation of cars suggests that the standard of *Brignoni-Ponce* is less stringent than the standard to be applied to pedestrians. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 314, n. 10. Moreover, since workplace surveys by their nature are severely intrusive of the rights of citizens and legal residents, but only of limited value in preventing or deterring illegal immigration, they serve a far lesser governmental interest than the roving patrol stops of *Brignoni-Ponce*, which were found necessary because of "the absence of practical alternatives to police the borders." Workplace surveys play no part in policing the border and have only superficial value in ameliorating the problem of illegal immigration in this country.

In *Brignoni-Ponce*, this Court held that it was necessary that Border Patrol agents have reason to suspect that any vehicle stopped in a border area contain illegal immigrants in order to protect the residents of that area from "potentially unlimited interference with their use of the highways." A far greater need exists to cure potential abuse of discretion by INS agents who execute workplace surveys because a much greater number of persons with no connection with illegal entry or transportation are detained for a much longer period of time than the characteristic border patrol stop of a minute or two. To permit seizures based upon mere suspicion of alienage alone would clearly "diminish the Fourth Amendment rights of citizens who may be mistaken for aliens." *Brignoni-Ponce* at 884.

Further, the application of the alienage standard urged by the Petitioners would result in discrimination against citizens and residents aliens of Hispanic origin. An INS policy memorandum defines reasonable suspicion of alienage as ethnic physical appearance in conjunction with any facts "such as foreign manner of dress or grooming, apparent inability to speak English, officer's knowledge of a high concentration of aliens in the area, or a specific tip from a reliable informant." J.A. 37-38. *Brignoni-Ponce*, held that a person's ethnic appearance standing alone would justify neither a reasonable belief of alienage nor of illegal alienage. 422 U.S. at 886. Although this Court permitted reliance

upon factors such as mode of dress or grooming "characteristic . . . of persons who live in Mexico," for the seizure of aliens suspected to have crossed our borders unlawfully, 422 U.S. at 885, such factors would have no validity in identifying aliens or illegal aliens among the workers upon whom the surveys focus, since those workers are predominantly persons who have integrated into our society. *Plyler v. Doe, supra*, at n. 17; J.A. 58-59, 66-67. One would be more likely to find an American college sophomore wearing a sombrero or huaraches [Mexican sandals] on a college campus, clothing of the kind that INS agents testified they look for in the surveys (*e.g.*, Smith Dep. pp. 170-171; Clarin Dep. 75-78) than an illegal alien, who would probably try to look like and act like his fellow workers of American descent, particularly because of his undocumented status. In a study of hundreds of recent immigrants from Mexico, not a single individual was encountered wearing a sombrero or huaraches. J.A. 58. Studies of Mexican labor immigration have shown that speaking with a foreign accent or difficulty in speaking English, physical appearance, mannerisms, dress, nervousness or avoiding eye contact are inadequate criteria for distinguishing between aliens or illegal aliens and American citizens who are part of Mexican-American culture.[47]

"Apparent inability to speak English" could only be determined after the detentive questioning had already occurred. Hence the INS policy memorandum states that suspicion of illegal alienage arises "generally after initial questioning on the basis of suspicion of alienage alone." J.A. 38. Even if one were to assume *arguendo* that an INS agent could lawfully question a worker in order to ascertain his ability to speak English, it would be of no assistance in determining alienage. Over three-quarters of all

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[47]See generally, J.A. pp. 55-76; Declarations of Wayne A. Cornelius, Sheldon Maram, Joe Razo, Edward Tchakalian. Thus, for example, 33% of U.S. citizens and legal resident aliens who originated from Mexico have no English competence and an additional 45% speak only a little English. J.A. 57.

United States citizens and legal resident aliens who originated from Mexico speak little or no English. J.A. 57. The "officer's knowledge of a high concentration of aliens in the area," would obviously be useless because of vagueness to distinguish aliens from U.S. citizens. The final listed factor of a "tip from a reliable informant," is simply never present. Petitioners admit that they conduct the surveys because of a lack of specific information permitting them to identify any particular individuals. Thus the only objective factor upon which distinctions among workers could actually be made under an alienage standard would be ethnic appearance. The result would be either discrimination against Hispanics or arbitrary selection based upon the whims of individual investigators in violation of the Fourth Amendment. *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1945); *United States v. Mallides*, 473 F.2d 859 (9th Cir. 1973).

In addition to its adverse effects on U.S. citizens of all backgrounds and its discriminating effects on Hispanic-Americans, a standard of detentive questioning based upon alienage alone would effectively deprive millions[48] of aliens lawfully residing in this country, many of them long-term residents, of their Fourth Amendment rights.

b. There is no statutory basis for any lesser standard of suspicion for detention than illegal alienage. 8 U.S.C. 1357(a)(1) does enable INS agents to question aliens as to their right to remain in the United States, but does not purport to authorize the detention of persons for interrogation upon mere suspicion of alienage.[49] Though Petitioners urge that Section 1357(a)(1) be

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[48]According to the 1980 United States Census, 5,182,000 registered aliens reside in the United States, including 1,096,000 persons originating from Mexico. Warren & Passel, *Estimates of Illegal Aliens from Mexico Counted in the 1980 United States Census* (1983).

[49]Lower courts have interpreted the authority of police officers and administrative officials to permit seizures only on the basis of suspicion of unlawful conduct. *Green v. United States*, 259 F.2d 80 (D.C. Cir. 1958), *cert. denied* 359 U.S. 907 (1959); *United States v. Grandi*, 424 F.2d 399 (2d Cir. 1970).

construed to permit the detention of persons on mere suspicion of alienage, such a construction would violate the principle of constitutional adjudication to construe the statute "if possible, in a manner consistent with the Fourth Amendment." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973). Thus the court below and other courts have construed Section 1357(a)(1) to authorize only questioning, but not the seizure of persons for questioning in the absence of reasonable suspicion of illegal alienage.[50] Moreover, this Court construed Section 1357(a)(1) to permit vehicle stops by the border patrol only on the basis of illegal alienage in *Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

Petitioners assert that the alien registration requirements of 8 U.S.C. Section 1304(a) justify detaining lawful resident aliens at any time, regardless of suspicion of wrong doing. The purpose of Section 1304(a) is to apprise the government of the number of aliens in this country and of their status. *United States v. Campos-Serrano*, 430 F.2d 173 (7th Cir. 1970), *affirmed* 404 U.S. 293, *cert. denied* 404 U.S. 1023. In order to carry out this purpose, it is not necessary that entirely innocent aliens be constantly subject to detention for questioning, as Petitioners suggest, since the alien registration requirements of 8 U.S.C. Section 1305 serve the same purpose.

Under Section 1305, aliens are required to register every change of address with the Attorney-General, or upon ten days notice from the Attorney-General, to notify the Attorney-General of their current addresses and such additional information as may be required. In 1981, Congress amended Section 1305 to eliminate the requirement that permanent residents register annually and temporary residents every three months. This amendment reflected a Congressional determination to eliminate an "unnec-

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[50] *International Ladies' Garment Workers v. Sureck*, 681 F.2d 624; *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971), *cert. denied* 404 U.S. 864 (1971); *Ojeda-Vinales v. INS*, 523 F.2d 286 (2d Cir. 1975); *Illinois Migrant Council v. Pilliod*, 548 F.2d 715 (7th Cir. 1977) (*en banc*).

essary burden" upon permanent resident aliens because existing registration records maintained by the INS were adequate when supplemented with change-of-address information to "meet the needs of the INS in the event the whereabouts of such individuals are needed. . . ."[51] Thus, no legitimate governmental interest connected with the registration requirements of 8 U.S.C. 1301 *et seq.* would be promoted by a standard which would permit innocent permanent and temporary resident aliens to be detained for questioning at the whim of INS agents.

c. Contrary to Petitioner's suggestion, this case cannot be compared to the "carefully defined classes of case," that involved businesses known to be within the scope of regulation, and inspections that are impersonal in nature. (*Marshall v. Barlow's, Inc.*, 436 U.S. 307, 317 (1978)). In contrast, this case has nothing to do with pervasively regulated businesses but rather concerns persons who are not known to be aliens, much less illegal aliens, *Almeida-Sanchez v. United States*, 413 U.S. 266, 271-272, and the highly intrusive and personal seizure of such persons. Petitioner's proposed standard would permit INS agents virtually unfettered discretion to roam at will among the places of work of our citizenry and to detain almost anyone at will. This Court has never suggested in any of its decisions that the Fourth Amendment can accommodate such an unlimited and highly intrusive program of governmental investigation.

Petitioners also suggest, as an alternative, that INS agents be permitted to detain all persons in any workplace that they choose to survey, for interrogation concerning their right to be in this country. The premise of the proposal, that it is justifiable to detain a majority of innocent workers in a workplace and to compel them to answer questions in order to uncover and apprehend some undocumented aliens is "intolerable and unreasonable." *Carroll v. United States*, 267 U.S. 132, 153 (1925).

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[51]House Report 97-116 to Immigration and Nationality Act Amendments of 1981, *reprinted in* 1981 *U.S. Code Cong. and Admin. News* p. 2595.

2. INS Agents Must Have a Particularized Suspicion That Each Person Detained for Questioning in a Workplace Survey Is an Illegal Alien.

Petitioners admit that other than on rare occasions, INS agents who perform workplace surveys have no information upon which to suspect any of the individuals employed within the workplace of being illegal aliens. (Petitioners' Brief at 43.) At Davis Pleating, for example, the affidavit in support of the general warrant that issued for the January 1977 survey consisted of statements made by aliens apprehended while attempting to enter to the effect that they believed other illegal aliens were presently employed without naming or describing any particular persons. The only particular statement in the affidavit was from the INS agent affiant who stated that he personally "noted that 20 persons of apparent Latin decent [sic] entered [through the west door]." (*ILGWU*, n. 5.) Petitioners argue, in effect, that since INS agents are unable to comply with the Fourth Amendment particularity requirement in carrying out workplace surveys, they should be excused from the requirement so that they can continue to carry out the surveys.

The primary abuse thought to characterize the writs of assistance which led to the passage of the Fourth Amendment "was their indiscriminate quality, the license that they gave to search every man without particularized cause. . . ."[52] Workplace surveys closely resemble general searches and seizures typified by writs of assistance. The pre-constitutional history of the Fourth Amendment establishes that the particularity requirement was adopted to insure that there be justification to interfere with the security of the particular person being seized or searched and also to guard against the danger of the petty tyranny of arbitrary searches or seizures.[53] Petitioners seek to be relieved from the particularity requirement precisely because they have no justification to interfere with the security of the many thousands of

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[52]Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L.Rev. 349, 366 (1974).

[53]Amsterdam, at p. 421.

innocent particular United States citizens and permanent legal resident aliens who are detained in the surveys. It is evident that only the particularity requirement of the Fourth Amendment protects persons who are captured in workplace surveys from arbitrary or indiscriminate seizures. This Court has held that INS agents who stop persons suspected of illegal alienage in border areas "must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 419 (1981). In contrast to the important governmental interest involved in *Cortez* of patrolling our borders, factory surveys are of questionable value in carrying out the legitimate objectives of our immigration laws, far more disruptive of the daily lives of many more of our citizens and much more intrusive than roving border stops of automobiles. There is no reason that any lesser standard of particularity should apply to workplace surveys.

Although the INS rarely has reason to suspect even a single worker before detaining all of the workers in the workplace during a survey, Petitioners argue that if there is reason to suspect some workers of being illegal aliens, this translates into a basis of suspicion for all the remaining workers in the workplace. This Court has rejected the notion of guilt by association. Thus, mere proximity to others suspected of crime does not give rise to a reasonable suspicion of criminal activity. *Ybarra v. Illinois*, 44 U.S. 85, 91 (1979); *Brown v. Texas*, 443 U.S. 47, 52 (1979); *Sibron v. New York*, 392 U.S. 40, 62 (1968). Similarly, mere appearance of Mexican ancestry and apprehension in an area where illegal aliens are frequently found cannot be the basis upon which to seize someone for investigation of illegal alienage. *United States v. Brignoni-Ponce, supra; United States v. Heredia-Castillo*, 616 F.2d 1147 (9th Cir. 1980).

Further, when the border patrol stops a vehicle in a border area, neither the driver nor any of the passengers may be questioned in the absence of reasonable cause to suspect the particular

persons being questioned of being illegal aliens.[54] *United States v. Cortez, supra; United States v. Heredia-Castillo*, 616 F.2d 1147, 1149 (9th Cir. 1980).

Petitioners' reliance upon this Court's previous cases involving administrative inspections simply ignores the vast and crucial distinctions between those cases and the facts at issue in this case. First, in the administrative search cases, the discretion of the officers is severely limited by the scheme of regulation itself. In *Colonade Corp. v. United States*, 397 U.S. 72 (1970) and *United States v. Biswell*, 406 U.S. 311 (1972), "the searching officers knew with certainty that the premises searched were in fact utilized for the sale of liquor or guns," while here the INS agents have no idea whether the persons in the workplace are aliens, much less illegal aliens. *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973). In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), agents of the Secretary of Labor could search only for safety or health hazards by virtue of the congressional scheme of regulation, but INS agents can question anyone that they choose. There is no law which makes it unlawful to employ illegal aliens and there is no limitation whatsoever that exists upon the discretion of INS agents in the field. They can decide what workplaces to survey at any given time and what individuals to detain without any limitation on their discretion. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 357 (1977).

A second major distinction between this case and the administrative search cases is that those cases involve only a very minor intrusion upon the personal privacy of the owner of the premises and virtually no intrusion at all on the privacy of anyone else. In this case, the surveys result in a substantial intrusion upon the

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[54]In order to police our borders, the border patrol must necessarily stop vehicles containing persons reasonably suspected to be illegal aliens, even if not all of the occupants are suspected illegal aliens. Border Patrol stops, however, often involve cases of illegal smuggling where all of the occupants of the vehicle that is stopped are suspected to be illegal aliens. *Cf. United States v. Cortez, supra.*

personal privacy of many persons in each workplace that is surveyed.[55]

Petitioners are supported only by a poorly reasoned decision, *Babula v. INS*, 665 F.2d 293 (3rd Cir. 1981), that conflicts not only with the opinions of all other lower courts that have considered the question but also with a previous Third Circuit decision which required individualized suspicion for an INS investigative detention. *Lee v. INS*, 590 F.2d 497 (3rd Cir. 1979). Contrary to *Babula*, all other courts have required that detentive questioning be supported by individualized suspicion. *Sureck*, 681 F.2d at 634; *Illinois Migrant Council v. Pilliod*, 548 F.2d 715 (7th Cir. 1977) (*en banc*), *modifying on other grounds* 540 F.2d 1062, 1070 (7th Cir. 1977); Ojeda-Vinales v. INS, 523 F.2d 286, 288 (2d Cir. 1975); *Au Yi Lau v. INS*, 445 F.2d 217, 223 (D.C. Cir. 1971); *Marquez v. Kiley*, 436 F.Supp. 100, 114 (S.D.N.Y. 1977); *LaDuke v. Nelson*, 560 F.Supp. 158 (E.D. Wash. 1982).

In contrast to the facts of this case, *Babula* did not concern itself with the rights of United States citizens and legal resident aliens. The issue came up in the review of a deportation order and the Petitioners argued that the exclusionary rule should have been applied to their admissions to INS agents because those admissions were obtained in response to detentive interrogation by INS agents. Although the Court acknowledged that "questioning without individualized suspicion raises serious Constitutional concerns," 665 F.2d at 297, it provided no analysis to justify the holding that the employees who were detained could be questioned without individualized suspicion. Moreover, the

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[55]Petitioners' reliance on *United States v. Villamonte-Marquez*, 103 S.Ct. 2573 (1983) is also misplaced. In that case, the legislative history of 19 U.S.C. § 1581(a) reflected that the First Congress which enacted the Fourth Amendment did not intend, thereby, to invalidate the suspicionless boarding of vessels by government officers. Moreover, the seizure was effectuated in a public ship channel and the attendant detention was brief. None of these factors are present in this case.

Babula court acknowledged that the agents detained the Petitioners when they surrounded the factory, 665 F.2d at 298, but failed to consider at all any of the other intrusive aspects of workplace surveys that were integral to the decision of the Ninth Circuit in this case. It is evident that *Babula* is simply an inadequately reasoned and wrongly decided case.

In sum, there is no justification to excuse the INS from the particularity requirement of the Fourth Amendment. If INS agents were permitted to detain our citizens, at will, based upon a generalized suspicion that illegal aliens might be present in a particular workplace or neighborhood, none of us would be safe from the tyranny of arbitrary INS detentions.

II.

INS WORKPLACE SURVEYS DISCRIMINATE AGAINST PERSONS OF LATIN ANCESTRY IN VIOLATION OF THE FIFTH AMENDMENT.

The INS factory surveys should be enjoined because they improperly discriminate against persons of Hispanic origin in violation of the due process clause of the Fifth Amendment. To the extent that the INS agents adhere to some standard in determining whom to question, it is evident that this standard is so vague and general and so slanted towards those of Hispanic origin that the only real factor that emerges is whether the "suspect" is Latin. Latin appearance is mentioned time and time again when agents attempt to articulate the standards they apply in deciding whether to approach an individual.[56] Moreover, the surveys take place in factories whose workforces are predominantly Hispanic[57] American and those victimized by the surveys clearly perceive them as being directed solely at persons[58] of Hispanic origin. Further, the extent of cross-culturization of Hispanic-American neighbor-

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[56]Smith Dep. p. 167; Tellez Dep. pp. 7-8, 20; Walters Dep. p. 43; Brechtel Dep. pp. 17, 29.

[57]Tellez Dep. p. 7; Brechtel Dep. p. 16; Walters Dep. p. 25.

[58]Miramontes Dep. pp. 43, 47, 51; Correa Dep. p. 66; Labonte Dep. pp. 58-59, 64, 66-67; Delgado Dep. p. 52.

hoods is such that the factors INS agents purport to apply, even if vigorously observed, would fail to distinguish to any meaningful degree between undocumented aliens from Latin-America and citizens of Hispanic ancestry. J.A. 59, 67.

As the Ninth Circuit noted in *United States v. Mallides, supra,* innocuous conduct does not become suspect merely because the person observed is non-white. Yet that is precisely what occurs during these raids. Every Latin is suspected of being an undocumented alien due to his or her race. Members of a distinct minority characterized by immutable traits are singled out because they are suspected to be illegal aliens. As a result, innocent members of the class suffer an impairment of their privacy (a loss not suffered by members of the White or Black community) because the standard applied fails to distinguish in any meaningful way between the guilty and the innocent.[59]

Respondents contend that this constitutes a denial of equal protection of the law to citizens of Hispanic origin.

Conclusion.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[59] "Minority Groups and the Fourth Amendment Standard of Certitude," 11 Harv.C.R.-C.L.L.Rev. 733 (1976).